Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

78-1148

NEW WORLD LIFE INSURANCE COMPANY,
Petitioner,

versus

GEORGIA INTERNATIONAL LIFE INSURANCE COMPANY
Respondent.

PETITION FOR WRIT OF CERTIORARI

COY R. JOHNSON
Lipscomb, Manton & Johnson
112 North Main Street
Cumming, Georgia 30130

LYNWOOD D. JORDAN, JR.
VanderHoff & Jordan
Post Office Box 738
Cumming, Georgia 30130

Counsel for Petitioner

DATED: January 19, 1979

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Comes now New World Life Insurance Company and respectfully requests this Honorable Court to grant this its petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

I. REFERENCE TO OPINIONS

The opinions of the Courts below, the United States District Court for the Northern District of Georgia, Atlanta Division, and the United States Court of Appeals for the Fifth Circuit, are unreported.

II. GROUNDS FOR JURISDICTION

(a) The per curiam decision, without opinion, of the United States Court of Appeals for the Fifth Circuit

was rendered and entered on October 24, 1978, this being case number 77-1300 in that court.

(b) No rehearings and no extensions of time have been applied for or granted subsequent to the decision of the United States Court of Appeals for the Fifth Circuit.

(c) The statutory provision conferring jurisdiction on this Honorable Court for review of the decision of the United States Court of Appeals for the Fifth Circuit is 28 U.S.C. § 1254(1).

III. QUESTIONS PRESENTED FOR REVIEW

A. While the initial holding of the trial court that the law of Georgia governs the contractural relationship of the parties is correct, is it improper to then hold that Florida law renders the contracts illegal thereby departing from established choice of law principles and from the accepted and usual course of judicial proceedings?

B. Is not the grant of summary judgment on the ground that the plaintiff is estopped to maintain this action contrary to the decisional law of this case, that of Georgia, because there is no evidence whatever that (1) there exists a false representation or concealment of fact; (2) that any party was ignorant of the truth; (3) that any party acted for the purpose of influencing the conduct of the other; (4) that any person was induced to act in reliance upon any conduct or statement; or (5) that any party changed its position for the worse; those being essential elements of the doctrine of estoppel under Georgia law?

C. Does not the holding that some degree of extra-territorial regulation of reinsurance by the State of Florida is proper to protect policyholders ignore decisions of this Court regarding the nature of reinsurance contracts and the lack of any connection between the original policyholder and the reinsurer?

D. Does not the opinion in this case dangerously jeopardize the established interstate system for the regulation of the insurance business and the system for the liquidation of insolvent insurers by confusing the "business of insurance" under the McCarran-Ferguson Act with the "reinsurance industry," and by confusing the process of liquidating the assets of an insolvent insurer under the Uniform Insurers Liquidation Act with the process of regulating the business of insurance?

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(a) Article I of the Constitution for the United States of America provides in part:

> The Congress shall have Power . . . [t]o regulate Commerce . . . among the several States. . . .

(b) Amendment 14 to the Constitution for the United States of America provides in part:

> . . . no State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(c) The *McCarran-Ferguson Act*, 15 U.S.C. § 1011, *et seq.* provides in part:

> . . . Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.
>
> * * *
>
> The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> * * *

(d) The Georgia Insurance Code, *Ga. Code Ann.*, § 56-1411 provides in part:

> Subsections (2) through (13), inclusive, of section 56-1401 through section 56-1410, both inclusive of this Chapter constitute and may be referred to as the Uniform Insurers Liquidation Act.

(e) The Florida Insurance Laws, *Fla. Stat. Ann.*, state in part:

> § 631.211 Subsections (2) to (13) inclusive, of § 631.011, together with §§ 631.031, 631.041 and 631.141-631.211 constitute and may be referred to as the uniform insurers liquidation act.
>
> § 624.411(2) As to foreign insurers the department shall not issue or permit to exist a certificate of authority unless such insurer has deposited and maintains deposited in trust with the department securities eligible for such deposit under § 625.52, having at all times a value of not less than as follows: . . .
>
> § 624.411(3) In addition to the deposit otherwise required pursuant to this section, the department may, after notice and hearing, require any insurer for good cause shown, to deposit and maintain deposited in trust for the protection of the insurer's policyholders or its policyholders and creditors, for such time as the department deems necessary . . . securities . . . having a value of not less than the amount which the department shall determine is necessary, which amount shall be not less than seventy-five thousand dollars, nor more than two hundred fifty thousand dollars, *depending on the insurer's obligations in this state.* (Emphasis supplied.)

V. STATEMENT OF THE CASE

This case began in the United States District Court for the Northern District of Georgia, Atlanta Division, upon a showing of diversity jurisdiction pursuant to 28 U.S.C. § 1332. Appellate jurisdiction to the United States Court of Appeals for the Fifth Circuit was grounded upon a final decision having been rendered under the provisions of 28 U.S.C. § 1291.

The parties to this action executed two reinsurance treaties or contracts for reinsurance in January, 1972. The petitioner—reinsurer is an Arizona insurance company and the respondent—reinsured is a Georgia insurance company.

The treaties required the Georgia company to cede to the Arizona company its chances of losses within certain limitations on policies written on named account numbers. The Georgia company was to pay certain sums to the Arizona company in return for indemnification by the Arizona company within certain limits.

The Georgia reinsured was required to supervise and pay all claims to any insureds and the Georgia reinsured received all premiums from the insureds, processed all claims, and forwarded ceding statements and bank drafts to the Arizona reinsurer from Atlanta, Georgia.

On October 26, 1972, the Commissioner of Insurance of the State of Florida issued a "bulletin" which stated in effect that no licensed insurer writing business in Florida could cede insurance covering a risk written "and/or" located in Florida unless the particular reinsurance treaty had been filed and approved in advance by Florida. No public hearing was conducted prior to the issuance of that bulletin which is not an official rule or regulation but is merely an opinion of the Commissioner of Insurance.

The Georgia reinsured continued to "warehouse" or hold the business on its books, treating it as being in fact ceded, and believed that the Florida officials would be forced to reverse their opinions.

The Georgia reinsured treated the business as being in fact ceded to the Arizona company on its books through the end of 1973 although it made no payments of reinsurance monies to the Arizona company subsequent to October, 1972.

Several efforts were made by both parties to resolve the disputes between themselves, and to resolve the disputes through the Insurance Commissioner of the State of Florida; however, the plaintiff Arizona company at no time considered the treaties terminated. No formal procedures were initiated by the Georgia company before the Florida Insurance Commissioner. The final effort to secure payment prior to suit was made by the Arizona company through a letter dated September 30, 1974.

This letter was prepared and forwarded a mere 10 days after the letter which the district court quotes in its opinion as the basis for its estoppel holding. And, in fact, the Insurance Commissioner of the State of Florida approved the settlement contained in that second letter and approved performance of the contracts by the Georgia reinsured. These letters were not to the Georgia reinsured, no statements were made to it, but were rather to the commissioner. His understanding was that the treaties were in force and he approved performance.

The Georgia reinsured, nevertheless, continued to refuse to perform under the contracts and this action was initiated in the district court by the Arizona reinsurer as a suit on the contracts. The district court granted summary judgment to the Georgia reinsured (the defendant) holding that the contracts were illegal and that the Arizona reinsurer was estopped to bring the action. The Arizona reinsurer appealed to the United States Court of Appeals for the Fifth Circuit which affirmed the district court per curiam without opinion.

VI. ARGUMENT

A. WHILE THE INITIAL HOLDING OF THE TRIAL COURT THAT THE LAW OF GEORGIA GOVERNS THE CONTRACTUAL RELATIONSHIP OF THE PARTIES IS CORRECT, IT IS IMPROPER TO THEN HOLD THAT FLORIDA LAW RENDERS THE CONTRACTS ILLEGAL THEREBY DEPARTING FROM ESTABLISHED CHOICE OF LAW PRINCIPLES AND FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

Because this is a diversity action involving parties to a contract of different States, the district court was first faced with the problem of determining the decisional law to be applied to the contracts. The district court properly determined that the law of Georgia applied to the reinsurance treaties.

At this point, however, the trial court parted from a proper analysis.

The district court held that ". . . the bulletin made illegal the treaties engaged in by the parties. . . ."

After the court properly determined that Georgia law governs the relations of the parties, it should have then determined whether or not the contracts were enforceable under that law — the law of Georgia. The very purpose of the choice of law determination is to seek that law which is necessary to decide upon the nature, interpretation, and validity of the engagement in question. *Pritchard v. Norton*, 106 U.S. 124 (1882).

"[A]n agreement is not a contract, except as the law says it shall be, and to try to make it one is to pull on one's bootstraps. Some law must impose the obligation, and the parties have nothing whatever to do with that; no more than whether their acts are torts or crimes." *E. Gerli & Co. v. Cunard S.S. Co.*, 48 F.2d 115 (2d Cir. 1931).

It is a clear misjudgment to decide, therefore, that the law of one state governs the relationship of the parties, and then to hold that the law of another state makes the contractual relationship of the parties illegal.

B. THE GRANT OF SUMMARY JUDGMENT ON THE GROUND THAT THE PLAINTIFF IS ESTOPPED TO MAINTAIN THIS ACTION IS CONTRARY TO THE DECISIONAL LAW OF THIS CASE, THAT OF GEORGIA, BECAUSE THERE IS NO EVIDENCE WHATEVER THAT (1) THERE EXISTS A FALSE REPRESENTATION OR CONCEALMENT OF FACT; (2) THAT ANY PARTY WAS IGNORANT OF THE TRUTH; (3) THAT ANY PARTY ACTED FOR THE PURPOSE OF INFLUENCING THE CONDUCT OF THE OTHER; (4) THAT ANY PERSON WAS INDUCED TO ACT IN RELIANCE UPON ANY CONDUCT OR STATEMENT; OR (5) THAT ANY PARTY CHANGED ITS POSITION FOR THE WORSE; THOSE BEING ESSENTIAL ELEMENTS OF THE DOCTRINE OF ESTOPPEL UNDER GEORGIA LAW.

In division "C" of its opinion, the district court de-

termined that the Arizona reinsurer is estopped to recover because it failed to challenge the Florida bulletins, failed to challenge the commissioner's determination, and considered the treaties to be terminated as of October, 1972.

Even were the evidence to be that clear, that is not an estoppel under Georgia law, the decisional law of this case. In *Bennett v. Davis*, 201 Ga. 58, 63 (1964), the elements necessary to raise an estoppel are set forth as: (1) a false representation or concealment of fact; (2) the representation or concealment being within the knowledge of the party making the representation or concealing the fact; (3) ignorance of the truth on the part of the person affected; (4) a specific intention on the part of the actor to influence the conduct of the other party; (5) an actual inducement to act by reason of the conduct and, in fact, and act actually occurring upon the basis of the representation or concealment in such a manner as to change the party's position for the worse.

None of those elements were established on the record in any manner. There was simply no evidence. In fact, the evidence is clear that the Georgia reinsured never changed its position or took any action. Since October, 1972, the only act taken by the Georgia reinsured was inaction, *i.e.*, it simply stopped paying any money to the Arizona reinsurer.

Even were there some evidence of estoppel, a question of fact is present with the letter on the behalf of the Arizona reinsurer, dated September 30, 1974, making it clear that the parties did not consider the treaties to be terminated.

C. THE IMPLICIT HOLDING THAT SOME DEGREE OF EXTRATERRITORIAL REGULATION BY THE STATE OF FLORIDA OF THE REINSURANCE CONTRACTS IS PROPER TO PROTECT POLICYHOLDERS WITHIN FLORIDA IGNORES DECISIONS OF THIS COURT REGARDING THE NATURE OF REINSURANCE CONTRACTS AND THE LACK OF ANY CONNECTION BETWEEN THE ORIGINAL POLICYHOLDERS AND THE REINSURER.

"Reinsurance" is a special type of contract, called a "treaty," harking back to the maritime nations of continental Europe. It is not a contract or policy of insurance but is rather a contract for indemnification where one company agrees to cede, and the other to accept, reinsurance business in accordance with the treaty terms.

From the opinion of the district court, it is clear that the court felt that Florida had some kind of interest in the reinsurance treaties based upon protection of the policyholders.

In *Connecticut General Life Insurance Co. v. Johnson*, 303 U.S. 77 (1938), this Court determined that imposition of a tax on reinsurance abridged the due process clause of the United States Constitution. In the *Connecticut General* case, the plaintiff was a Connecticut corporation admitted in California for the purpose of carrying on the business of insurance in that state. The Connecticut plaintiff entered into reinsurance contracts in the state of Connecticut which reinsured the potential business losses of other companies

likewise writing California policies. The state of California attempted to impose an annual tax on the Connecticut corporation for the "premiums" received. The Supreme Court of California held that the Connecticut company had to pay the taxes and the Connecticut company appealed to this Court. The specific question was ". . . whether a tax laid by California on the receipt by appellant in Connecticut of the reinsurance premiums during the years 1930 and 1931, infringes the Due Process clause of the 14th Amendment." This Court held that it did. The *Connecticut* Court simply held that the due process clause denied to California the power to tax or regulate the Connecticut corporation's property and activities elsewhere. The *Connecticut* Court specifically stated that reinsurance contracts undertake only to indemnify the reinsured company against losses.

More recently, in *United States v. Consumer Life Insurance Company*, 430 U.S. 725 (1977), this Court reaffirmed the historic view, at page 730, note 7, that reinsurance treaties constitute contracts beween the companies only, and that the policyholders are not involved.

This is not the first time that the State of Florida has attempted to exceed permissible bounds. In *State of Florida v. Deparment of Insurance*, 291 N.E. 2d 906 (Ct. App. Ind. 1973), an Indiana insurance corporation (the ceding company or reinsured) which had reinsured some of its liabilities with another Indiana company entered into liquidation in Indiana with a domiciliary receiver there, and an ancillary receiver being appointed in Florida. Florida filed a motion in the Indiana Court for an order to reserve to Florida all

rights concerning reinsurance pertaining to policies covering risks located in Florida. The motion was denied and Florida appealed. The court held that there were no assets located in Florida arising out of the reinsurance treaty and that Florida had no interest in the treaty proceeds. The fact that the original policies were in Florida had no effect and the court recognized that a reinsurance treaty had nothing whatever to do with the loss by the hazard specified in the original policy with the insured.

The district court attempted to find some sort of interest in the present case by holding that an insured residing in Florida has some sort of direct right of action against a foreign reinsurer. The court relied upon *Mitchell v. State of Florida*, 223 So. 2d 792 (1969), but it misinterpreted that case. That was merely a case holding that where a reinsurer binds itself by the express terms of the treaty to the express terms of the original policy, the insured will be entitled to a priority in a liquidation proceeding. All that case was about was a battle of priority to receivership assets located in the jurisdiction, nothing more.

Florida protects its insureds through asset regulation of admitted insurers writing original business in that state, and cannot impermissibly regulate a contract of reinsurance having nothing to do with policyholders in the state of Florida, especially when the situs of the contract is the State of Georgia.

D. DOES NOT THE LOWER COURT'S OPINION IN THIS CASE, AFFIRMED PER CURIAM DANGEROUSLY JEOPARDIZE THE ESTABLISHED INTERSTATE SYSTEM FOR

THE REGULATION OF THE INSURANCE BUSINESS AND FOR THE LIQUIDATION OF INSOLVENT INSURERS BY CONFUSING THE BUSINESS OF INSURANCE UNDER THE McCARRAN-FERGUSON ACT WITH THE REINSURANCE INDUSTRY, AND BY CONFUSING THE PROCESS OF LIQUIDATING ASSETS OF AN INSOLVENT INSURER UNDER THE UNIFORM INSURERS LIQUIDATION ACT WITH THE PROCESS OF REGULATING THE BUSINESS OF INSURANCE?

By holding that there is a direct cause of action against the reinsurer by a policyholder utilizing *Mitchell v. State of Florida*, 223 So. 2d 792 (Fla. App. 1969) (despite the fact that the choice of law determination was in favor of Georgia), the trial court's opinion in this case calls into question the system of liquidation of insurance companies throughout the United States under the Uniform Insurers Liquidation Act, *Georgia Code Annotated* Chapter 56-14 (Rev. 1971). The system is set up so that an insurance company operating in several states upon liquidation surrenders its assets to those states as they are present in the various jurisdictions, as was seen in the case of *State of Florida v. Department of Insurance*, 291 N.E.2d 906 (Ct. App. Ind. 1973), mentioned earlier. To hold that, should the Georgia reinsured involved in this case become insolvent a Florida policyholder could reach assets in Georgia, flies in the face of the system of liquidation established throughout the states. That would, apparently, give an ancillary receiver in the state of Florida a right to move into the Florida or Georgia courts and sue the domiciliary receiver in Georgia. This is clearly wrong. After the assets in Florida are depleted, the

individual policyholders may file claims with the domiciliary receiver, assuming arguendo that they do in fact have a claim.

The opinion of the trial court also throws into question the intent and purposes of the *McCarran-Ferguson Act*, 15 U.S.C. § 1011, *et seq.*, which exempted regulation of insurance and taxation from the commerce clause restrictions. *McCarran-Ferguson* declared, in response to the case of *United States v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944), that the regulation and taxation of the "business of insurance" by the states is in the public interest and is subject to the laws of the several states. That was not all, however, as this Court quoted in *State Board of Insurance v. Todd Shipyards Corp.*, 370 U.S. 451, 455 (1962):

> It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the *Southeastern Underwriters Association case.* Briefly, your committee is of the opinion that we should provide for the continued regulation and taxation of insurance by the States, subject always, however, to the limitations set out in the controlling decisions of the United States Supreme Court, as, for instance, in *Allgeyer v. Louisiana* (165 U.S. 578), *St. Louis Compress Co. v. Arkansas* (260 U.S. 346), and *Connecticut General Insurance Co. v. Johnson* (303 U.S. 77), which hold, inter alia,

> that a State does not have power to tax *contracts* of insurance *or reinsurance entered into outside its jurisdiction by individuals or corporations resident or domiciled therein covering risks within the State or to regulate such transactions in any way.* (Emphasis supplied.)

This court, in the *Todd* case, made it quite clear that the *McCarran-Ferguson Act* handed back to the states only the regulation of the "business of insurance." Reinsurance is not "the business of insurance" and this Court has held that federal law does indeed govern contracts which do not involve "insurance." *Securities and Exchange Commission v. Variable Annuity Life Insurance Company of America*, 359 U.S. 65 (1959). "[The *McCarran-Ferguson Act* does not] make the States supreme in regulating all the activities of insurance *companies*, but [is] concerned with regulating the *business* of insurance and [focuses] on the insurance company — policyholder relationship." Syllabus by the Court, *Securities and Exchange Commission v. National Securities, Inc.*, 393 U.S. 453 (1969). (Emphasis in original.)

As this Court recognized implicitly in *United States v. Consumer Life Insurance Company*, 430 U.S. 725 (1977), the proper regulation of an insurance company is by regulation of its assets and reserves, as far as policyholder protection is concerned. The record in this case is clear that the insurance commissioner in Florida did not allow the Georgia reinsured to take credit for reserve purposes of its reinsurance treaty proceeds with the Arizona reinsurer who was not admitted in the State of Florida. That is the extent of

permissible regulation.

The district court opinion in this case, therefore, throws into question established principles of reinsurance law and of insurance company liquidation procedures. It is essential that these problems be rectified by this Court.

VII. OPINIONS OF THE COURTS BELOW

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

NEW WORLD LIFE INSURANCE COMPANY	:	
vs.	:	C75-1346A
GEORGIA INTERNATIONAL LIFE INSURANCE COMPANY	:	

ORDER

This is an action for breach of contract brought by New World Life Insurance Company (New World), an Arizona corporation, against Georgia International Life Insurance Company (Georgia International), a Georgia corporation. The case is presently before the Court on the defendant's motion for summary judgment and the plaintiff's motion for partial summary judgment.

The facts of the case are as follows: plaintiff New World was formed on September 9, 1971, by William F. Davis, a resident of Florida who has owned 100 percent of plaintiff's stock since its inception. Davis

also owns an independent insurance agency, Davis Plan, Inc., which is located in South Florida.

Davis Plan, Inc., was a general agent for Piedmont Life Insurance Company (Piedmont) in 1971 and in that year discussed the formation of an Arizona company for the purpose of negotiating reinsurance treaties with Piedmont. Before the company was established and the treaties signed, Piedmont merged into defendant Georgia International. In January 1972, two treaties were executed, the parties to which were Georgia International and New World; the treaties provided that certain credit life insurance and credit disability insurance policies written by Davis Plan, Inc., in Florida on Florida risks would be ceded by Georgia International to New World, with premiums to be forwarded by Georgia International to New World according to a formula established in the treaties. New World would then indemnify Georgia International up to certain limits for losses suffered under the enumerated policies. Responsibility for supervision and payment of all claims of the insureds remained with Georgia International. Clients would have no knowledge of the reinsurance agreement and would have no contact with New World. The treaties were executed by Georgia International in Atlanta, Georgia, and by Davis on behalf of New World in Hollywood, Florida, pursuant to negotiations held in Atlanta.

Georgia International began cessions in January 1972, forwarding ceding statements and reinsurance premium payments to New World in Arizona until October 26, 1972, when Bulletin No. 567 was issued by the Insurance Commissioner of the State of Florida. The bulletin provided that reinsurance agreements

between licensed carriers in Florida and unlicensed reinsurers violated section 626.901 of the Florida Statutes. After issuance of the bulletin, Georgia International ceased making cession payments but did continue to forward the statements required by the treaties to New World. Davis Plan continued to act as an agent for Georgia International until late 1974, at which time the business was changed to another insurance company; no reinsurance agreement was executed with that company. The question presented in the defendant's motion for summary judgment is whether or not the policy statement rendered the treaties executed by the parties illegal and thus absolved the defendant of any obligation to perform under the treaties.

A. Conflict of Laws Questions

The defendant argues that this Court must apply Florida law to the question at bar inasmuch as the law of the forum, Georgia, adheres to the "grouping of contacts" theory presented in the *Restatement (Second) of Conflicts* § 188 (1971). Defendant argues that Florida had the most substantial contacts with the contract since the contract was executed in Florida, the insurance policies enumerated in the treaties were written in Florida on Florida risks by a Florida corporation, and the plaintiff corporation is 100 percent owned by a Florida citizen. Defendant further alleges that William F. Davis organized New World to avoid restrictions on commissions contained in the Florida statutes.

The plaintiff asserts that Florida law is inapplicable to the facts presented and that Georgia law controls.

Plaintiff points out that a reinsurance contract is not a policy of insurance but is instead a contract for indemnification between reinsurer and the reinsured. Therefore, argues plaintiff, the policies underlying the contract of reinsurance are not relevant to the contract. Plantiff argues that the preliminary negotiation of the contract took place in Georgia and Arizona, that the cessions by Georgia International were made in Atlanta, that all performance of the contract was to take place in Georgia, that any arbitration would occur in Georgia, and that the locus of the reinsurance contract is therefore Georgia.

The Court finds that under the "most significant relationship" test set out in the *Restatement (Second) of Conflicts* (1971) and followed in *Eldon Industries, Inc. v. Paradies and Co.*, 397 F. Supp. 535 (N.D. Ga. 1975), the laws of Georgia control in the present action. Of the five factors set out in the *Restatement*, only one, the place of contracting, indicates that Florida law should control. Under the other factors the laws of Arizona and Georgia are indicated, with Georgia prevailing. Georgia law controls in the decision of this action.

B. Illegality of the Contract

Defendant claims that it is exempt from compliance with the terms of the contract under Ga. Code Ann. § 20-111, which provides: "Void conditions . . . . [I]llegal conditions are void, and are binding on no one." Bulletin No. 567 issued by the Insurance Commissioner of Florida provides, in pertinent part:

> An investigation conducted by this Department has disclosed that many licensed companies are not complying with the provision of Section 626.901, Florida Statutes.
>
> [N]o licensed insurer shall cede or retrocede insurance covering a risk written and/or located in this state, unless the reinsurance contract has been filed and approved in advance.
>
> * * *
>
> No further cessions and/or retro cessions shall be made from this date to any unlicensed reinsurer.

The defendant's argument is that Bulletin No. 567 rendered illegal the treaties between the parties and that such illegality excused both parties from performance under the contract. Defendant states further that the Commissioner specifically stated in a letter to Davis in February 1973, that the treaties dealing with Florida risks between New World and Georgia International would not be approved. Defendant argues that to uphold the treaties and find Georgia International in breach thereof would be to require subjection of defendant to criminal penalties and the loss of Georgia International's Florida license. Finally, defendant argues that New World is estopped from asserting any claim against Georgia International because of plaintiff's failure to challenge the Commissioner's ruling.

The plaintiff argues that the contract is enforceable inasmuch as the state of Florida may not extend its regulation to companies which are not domiciled therein under *Connecticut General Life Insurance Co. v. Johnson*, 303 U.S. 77 (1938). Plaintiff states that under *St. Louis Cotton Compress Co. v. Arkansas*, 260 U.S. 346 (1922), the state of Florida may regulate activities of foreign corporations within the state but

may not regulate the making of contracts outside the jurisdiction where performance also will be outside the state.

The Court finds that regardless of the places designated as the place of contracting or the place of performance, the state of Florida had a sufficient interest in the contracts in question to subject the contracts to regulation by the Florida Insurance Commissioner.

Where a reinsurance contract provides that the terms of the original insurance contract are adopted in the reinsurance treaty, the original insured has a direct cause of action against the reinsurer. *Mitchell v. State of Florida*, 223 So. 2d 792 (Fla. App. 1969). Thus the state of Florida has a clear interest in ascertaining that the reinsurance companies which are ultimately liable for losses on risks insured within the state are solvent corporations.

In *Hoopeston Canning Co. v. Cullen*, 318 U.S. 313 (1943), the Supreme Court stated:

> In determining the power of the state to apply its own regulatory laws to insurance business activities, the question in earlier cases became involved by conceptualistic discussion of theories of the place of contracting or of performance. More recently it has been recognized that a state may have substantial interests in the business of insurance of its people or property regardless of these isolated factors. This interest may be measured by highly realistic considerations such as the protection of the citizen insured or the protection of the state from the incidents of loss.

318 U.S. at 316-17. This 1943 case made obsolete the place of contracting a performance theories set forth in *Allgeyer v. Louisiana, supra, St. Louis Cotton Compress Co. v. Arkansas, supra,* and *Connecticul General Life Insurance Co. v. Johnson, supra,* the cases relied on by plaintiff.

Florida violated no constitutional rights of the plaintiff in its exercise of regulatory authority. The plaintiff's argument that the regulation of only credit life insurance sales is a violation of the Equal Protection Clause fails because the differentiation in treatment here has a rational foundation in fact and is not inherently and patently unreasonable. *See McGowan v. Maryland*, 366 U.S. 420 (1961).

Bulletin No. 567 was properly issued by the Florida Commission of Insurance as an explanation of F.S.A. § 626.901. The regulation made illegal the reinsurance treaty entered into by the parties and the defendant was justified in relying on illegality of the contract as an excuse for nonperformance.

C. Estoppel

Even were the contract not illegal, however, the plaintiff is estopped from suing defendant inasmuch as the plaintiff failed to challenge the Insurance Commissioner's rulings and indicated by letter to the Commissioner that it considered the treaties terminated as of October 1972. The letter written by New World's counsel, Mr. Feldman, to the Insurance Commissioner, reads in part as follows:

> With the promulgation of your Bulletin restricting the activities of unauthorized reinsurers, the rein-

surance agreement between Georgia International and New World was terminated.

Further indication that the parties considered the agreement terminated is presented in the negotiations between the parties to establish a new arrangement under which Georgia International would cede the insurance business in question to a new corporation to be established by Davis and which would be qualified to do business in the state of Florida. No new arrangement would have been necessary or desirable but for the recognition by the parties that the treaties under which they were operating were illegal under Florida law.

New World's argument that Georgia International had an obligation to challenge the Commissioner's ruling is not meritorious; plaintiff had access to the Florida courts and was the only party with an interest in invalidating the Florida regulation. Plaintiff apparently recognized the presumptive legality of the Commissioner's regulation and failed to challenge it; plaintiff may not now, therefore, attempt to strike down the regulation in a suit against Georgia International.

The Court finds that the Insurance Commissioner of Florida properly asserted his authority in the promulgation of Bulletin No. 567; that the bulletin made illegal the treaties engaged in by the parties and thereby excused the parties from performance under the treaties; that the parties acknowledged the illegality of the treaties and attempted to establish alternative arrangements; and that the parties are therefore estopped from actions to enforce the treaties.

Accordingly, the defendant's motion for summary judgment is hereby ORDERED GRANTED. The plaintiff's motion for partial summary judgment is hereby ORDERED DENIED.

SO ORDERED, this 21st day of December, 1976.

UNITED STATES DISTRICT JUDGE

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 77-1300

NEW WORLD LIFE INSURANCE COMPANY,
Plaintiff-Appellant,

versus

GEORGIA INTERNATIONAL LIFE INSURANCE CO.,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

(OCTOBER 24, 1978)

BEFORE BROWN, Chief Judge, TUTTLE and THORNBERRY, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

[1] See N.L.R.B. v. Amalgamated Clothing Workers of America, 1970, 430 F. 2d 966.

VIII. CONCLUSION

For the above reasons, your petitioner respectfully requests this Court to grant Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

COY R. JOHNSON

LYNWOOD D. JORDAN, JR.

COY R. JOHNSON
Lipscomb, Manton & Johnson
112 North Main Street
Cumming, Georgia 30130

LYNWOOD D. JORDAN, JR.
VanderHoff & Jordan
Post Office Box 738
Cumming, Georgia 30130

Counsel for Petitioner

IX. CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing Petition for Writ of Certiorari upon the following counsel of record by depositing a copy in the United States Mail with sufficient postage affixed thereto and properly addressed to:

King & Spalding
Attention: Mr. Lanny B. Bridgers
2500 Trust Company Tower
Atlanta, Georgia 30303
Counsel for Respondent

This 19th day of January, 1979.

LYNWOOD D. JORDAN, JR.

Supreme Court, U. S.
FILED
FEB 22 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1148

NEW WORLD LIFE INSURANCE COMPANY,
Petitioner,

vs.

GEORGIA INTERNATIONAL LIFE INSURANCE COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

KING & SPALDING
CHARLES H. KIRBO
2500 Trust Company Tower
Atlanta, Georgia 30303
404/572-4600
Counsel for Respondent

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1148

NEW WORLD LIFE INSURANCE COMPANY,
Petitioner,

vs.

GEORGIA INTERNATIONAL LIFE INSURANCE COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Georgia International Life Insurance Company ["Georgia International"] respectfully requests this Court to deny the petition of New World Life Insurance Company ["New World"] for writ of certiorari, seeking review of the opinion of the Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinions below are correctly set forth in the petition. [Pet. 17-26.]

JURISDICTION

The jurisdiction of this Court is accurately stated in the petition. [Pet. 1-2.]

QUESTIONS PRESENTED

(1) Whether the Court of Appeals for the Fifth Circuit and the District Court for the Northern District of Georgia were correct in holding that the regulation of the Commissioner of Insurance for the State of Florida contained in Bulletins 567 and 567A made certain reinsurance treaties illegal and excused their performance?

(2) Whether the Court of Appeals for the Fifth Circuit and the District Court for the Northern District of Georgia were correct in holding that New World's failure to challenge the regulation of the Commissioner of Insurance for the State of Florida contained in Bulletins 567 and 567A estopped New World from suing for breach of the reinsurance treaties?

(3) Whether the Court of Appeals for the Fifth Circuit and the District Court for the Northern District of Georgia were correct in holding that New World's course of conduct, including its admission to the Commissioner of Insurance for the State of Florida that it considered the reinsurance treaties terminated as of October, 1972, estopped New World from suing for breach of those treaties?

STATUTES INVOLVED

In addition to those statutes set forth in the petition [Pet. 3-5], the following statutes are relevant to the questions presented:

§626.901 of the Florida Statutes provides in part:

"(1) No person shall, from offices or by personnel or facilities located in this state, directly or indirectly act as agent for, or otherwise represent or aid on behalf of another, any insurer not then authorized to transact

such insurance in this state, or in any other state, in the solicitation, negotiation, procurement, or effectuation of insurance or annuity contracts or renewals thereof, the dissemination of information as to coverage or rates, the forwarding of applications, the delivery of policies or contracts, the inspection of risks, the fixing of rates, the investigation or adjustment of claims or losses, or the collection or forwarding of premiums or in any other manner represent or assist such an insurer in the transaction of insurance with respect to the subject of insurance resident, located, or to be performed in this state . . . ."

§626.902 of the Florida Statutes provides:

"(1) Any person who in this state represents or aids an unauthorized insurer in violation of §626.901 shall upon conviction thereof be guilty of a misdemeanor of the second degree, punishable as provided in §775.082 or §775.083."

§624.610 of the Florida Statutes, as it appeared at the time of the transactions at issue, provided in part:

"(1) An insurer may accept reinsurance only of such risks, and retain risk thereon within such limits, as it is otherwise authorized to insure.

(2) An insurer may reinsure all or any part of any particular risk with an insurer *authorized to transact insurance in this state or approved or accepted by the department* for the purpose of such reinsurance. The department shall not so approve any proposed reinsurance which it finds would be contrary to the proper interests of the policyholders or stockholders of a ceding domestic insurer, or which is in violation of §624.404(5) ('fronting company')." (Emphasis supplied.)

§624.610 of the Florida Statutes was amended effective June, 1974, to add the following sentence to subsection (1):

> "(1) . . . No insurer shall cede or retrocede credit life, credit disability, or both credit life and credit disability insurance covering a risk located or written in this state to any insurer not authorized to transact insurance in this state or approved or accepted by the department for the purpose of such reinsurance."

§624.404 of the Florida Statutes, as amended effective June, 1974, provides in part:

> "(5) No authorized insurer shall act as a fronting company for any unauthorized insurer. A 'fronting company' is an authorized insurer which by reinsurance or otherwise generally transfers to one or more unauthorized insurers substantially the entire risk of loss under substantially all of the insurance written by it in this state, or on one or more lines of insurance on all of the business produced through one or more agents or agencies, or on all of the business from a designated geographical territory . . ."

STATEMENT OF THE CASE

While Georgia International does not agree with or adopt the statement of the case presented in Petitioner's Brief, it sees no reason to burden this Court further with a detailed recitation of the transactions which gave rise to this lawsuit. Certain items were, however, omitted from Petitioner's statement which are crucial to the decisions of the courts below. This Court's attention is respectfully directed to the following facts:

(a) All policies which were the subject of the reinsurance treaties were written on Florida residents by a Florida agent.

(b) Petitioner-insurance company was created under Arizona law to circumvent commission limitations imposed by Florida law.

(c) Georgia International performed its obligations under the treaties, made cessions, and cooperated with New World in every way until issuance of the Commissioner's Bulletins made further performance impossible.

(d) The Commissioner clearly intended his directive to apply to the reinsurance treaties at issue here. The parties brought their reinsurance arrangements to the express attention of the Commissioner and asked that he approve them. He refused, saying that the treaties were prohibited by the terms of his Bulletins.

(e) Georgia International was authorized to and did transact substantial business in Florida. It was thus subject to the plenary authority of the Commissioner. New World, because of its low capitalization of $37,500, could not qualify to do business in Florida and never held a certificate of authority from that state.

(f) New World never challenged the legality or validity of the Commissioner's Bulletins, either in general or as it applied to New World; nor did it request Georgia International to do so.

(g) New World itself represented to the Commissioner in a letter written by its counsel that New World and Georgia International were exploring alternative arrangements made necessary because the Bulletins had "terminated" the reinsurance agreements between Georgia International and New World.

REASONS FOR DENYING THE WRIT

I. The decisions of the lower courts turned upon peculiar facts which have been thoroughly explored twice before.

New World asks this Court to make a third review of a case turning on peculiar facts, which have been given lengthy attention by two lower courts. This Court has ruled that such an investigation is not a task to be served by a grant of certiorari: "We do not grant certiorari to review evidence and discuss specific facts." *United States* v. *Johnson*, 268 U.S. 220, 227 (1925).

II. The issues involved are too narrow to warrant review by this Court.

The case before the Court actually presents only a single issue: whether an insurance company, operating in Florida and dependent upon the Commissioner's approval for its continued right to do business in that state, may be penalized for stopping performance of reinsurance treaties which the Commissioner had declared illegal. The question itself demonstrates that this case is wholly lacking in the overriding importance necessary to justify a grant of certiorari. Instead, the present case presents merely a business dispute between two insurance companies which turns on the administrative propriety of the Commissioner's interpretation of narrow Florida statutes.

Both courts below held that New World's claim was barred by two separate defenses, estoppel and illegality. *Either* defense standing alone would have been sufficient to prevent recovery. [Opinion of Judge Moye, Pet. at 23.] Even more importantly, as both lower courts recognized, New World's claim, if indeed it ever had one, is now stale

and untimely: its argument should have been addressed to the Department of Insurance at a time when a reversal or invalidation of a Commissioner's actions would have reinstated the contractual obligations of the parties.

The limited import of the issues raised in this matter is further demonstrated by the fact that Florida has subsequently passed legislation codifying the position of the Commissioner as to the capital requirements for the reinsurers. See Florida Statutes, §624.610, as amended; §624.404, as amended.

III. Nothing in the opinions of the lower courts is in conflict with prior holdings of this Court.

The holdings of the lower courts that the Florida Insurance Commissioner was presumptively justified in the issuance of his regulation does not conflict with the cases cited by Petitioner. The cases cited by New World in support of its argument that the Commissioner's regulation was impermissibly "extraterritorial," are clearly distinguishable. Both *Connecticut General Life Insurance Co.* v. *Johnson*, 303 U.S. 77 (1938) and *State Board of Insurance* v. *Todd Shipyards Corp.*, 370 U.S. 451 (1962) differ from the case at bar in that they involved exclusionary taxes rather than protective regulation. This Court and the Courts of Appeals are in unanimous agreement that different standards govern analysis of the police power and the taxation power. Only a low threshold of state interest is necessary to justify an exercise of the police power, even where the exercise has repercussions beyond state borders. *Hoopeston Canning Co.* v. *Cullen*, 318 U.S. 313 (1943); *Travelers Health Ass'n* v. *Virginia*, 339 U.S. 643 (1950); *Alden's, Inc.* v. *Packell*, 524 F.2d 538 (3d Cir. 1975).

Just as the holdings below do not offend this Court's notion of substantive due process, neither do they endanger

this Court's interpretation of the McCarran-Ferguson Act. Indeed the cases relied on by New World address issues wholly unrelated to the present controversy. This Court in both *SEC* v. *National Securities, Inc.*, 393 U.S. 453 (1969) and *SEC* v. *Variable Annuity Life Insurance Co. of America*, 359 U.S. 65 (1959) dealt with attempted state regulation of the company-shareholder relationship and held only that the McCarran-Ferguson Act does not insulate state securities regulation from federal interference. Actions such as those of the Commissioner which are addressed to the fundamental interests of the policyholders are precisely the type of regulation the McCarran-Ferguson Act left to the states. *National Securities* at 460.

CONCLUSION

The findings of the District Court and the Court of Appeals are fair, well-reasoned and amply supported by the record and legal authority. Respondent Georgia International Life Insurance Company prays that the Petition for a Writ of Certiorari to the Court of Appeals for the Fifth Circuit be denied.

Respectfully submitted,

KING & SPALDING
CHARLES H. KIRBO
2500 Trust Company Tower
Atlanta, Georgia 30303
404/572-4600
Counsel for Respondent

CERTIFICATE OF SERVICE

I, Charles H. Kirbo, attorney for respondent Georgia International Life Insurance Corporation, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 19th day of February, 1979, I served three true copies of the foregoing Brief in Opposition upon the petitioner, by depositing in a United States mailbox true copies of said brief, with first class postage prepaid, correctly addressed to the following, as required by Supreme Court Rule 33:

Mr. Lynwood D. Jordan
VanderHoff and Jordan
Post Office Box 738
Cumming, Georgia 30130

CHARLES H. KIRBO
Attorney for Respondent Georgia International Life Insurance Company